

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN S. EPPERSON,	§
	§ No. 611, 2009
Defendant Below-	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 9408009291
	§
Plaintiff Below-	§
Appellee.	§

Submitted: November 2, 2009

Decided: November 23, 2009

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices

**ORDER**

This 23<sup>rd</sup> day of November 2009, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Kevin S. Epperson, filed an appeal from the Superior Court's October 12, 2009 order denying his motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit. We agree and affirm.

(2) The record reflects that, in March 1996, Epperson was found guilty by a Superior Court jury of Kidnapping in the First Degree and Unlawful Sexual Contact in the Second Degree. He was sentenced as a habitual offender to a total of 52 years of Level V incarceration. Epperson's convictions were affirmed by this Court on direct appeal.<sup>1</sup> Since that time, Epperson has filed approximately fourteen motions for postconviction relief.

(3) In his appeal from the Superior Court's denial of his latest postconviction motion, Epperson claims that the Superior Court should not have denied his postconviction motion on procedural grounds because he demonstrated that the State committed a Brady violation at trial and that he is actually innocent, thereby bypassing the procedural bars of Rule 61.<sup>2</sup>

(4) Delaware law requires that the Superior Court first address the procedural requirements of Rule 61 before reviewing the merits of a postconviction motion.<sup>3</sup> Epperson's most recent motion, filed approximately twelve years after his conviction became final, is plainly barred as untimely.<sup>4</sup> As the latest in a long series of postconviction motions, it also is barred as repetitive.<sup>5</sup> Finally, the record reflects that Epperson's

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<sup>1</sup> *Epperson v. State*, Del. Supr., No. 214, 1996, Walsh, J. (Feb. 6, 1997).

<sup>2</sup> In an addendum to his brief, Epperson also argues that he should not have been sentenced as a habitual offender.

<sup>3</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>4</sup> Super. Ct. Crim. R. 61(i)(1).

<sup>5</sup> Super. Ct. Crim. R. 61(i)(2).

claim of actual innocence mirrors his previous claim of insufficiency of the evidence, which was advanced and rejected in his direct appeal. As such, the claim is procedurally barred as formerly adjudicated.<sup>6</sup> In the absence of any evidence of a miscarriage of justice resulting from a constitutional violation,<sup>7</sup> the Superior Court's denial of Epperson's postconviction motion must be affirmed.

(5) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice

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<sup>6</sup> Super. Ct. Crim. R. 61(i)(4).

<sup>7</sup> Super. Ct. Crim. R. 61(i)(5).